



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

October 6, 1992

Ms. Georgia D. Flint  
Commissioner  
Texas Department of Insurance  
P. O. Box 149104  
Austin, Texas 78714-9104

Open Records Decision No. 609

Re: Whether insurance underwriting guidelines are trade secrets exempt from the Texas Open Records Act (RQ-413)

Dear Commissioner Flint:

On May 15, 1992, the Department of Insurance (the "department") requested that this office determine whether automobile insurance underwriting guidelines which had been obtained by the department or the State Board of Insurance (the "board") were exempt from disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. On June 5, 1992, the department amended and amplified this request. This opinion will address the concerns expressed in both your May 15 and June 5 letters.

The department has obtained underwriting guidelines from certain automobile insurers both under a subpoena issued pursuant to the commissioner and the board's subpoena authority under article 1.19-1 of the Insurance Code, and in response to a special call for data. The department has entered into confidentiality agreements with the subpoenaed insurance companies. You have taken the position that information submitted pursuant to the subpoena is exempted from the Open Records Act (the "act") under section 3(a)(1) of the act, because it is deemed confidential by statute -- the statute in question being section 1(d) of article 1.19-1 of the Insurance Code. You do not, however, endorse the contention of the insurers that automobile insurance underwriting guidelines are exempt under section 3(a)(4) of the act as "information which, if released, would give advantage to competitors or bidders," or that guidelines are exempt as trade secrets under section 3(a)(10).

As you frame the issues in your June 5, 1992, amended request, two questions are to be answered:

- (1) Whether the auto underwriting guidelines produced pursuant to the subpoenas issued under Article 1.19-1 of the

Texas Insurance Code which are covered by the . . . confidentiality agreement are open records under the Texas Open Records Act.<sup>1</sup>

(2) Whether the auto underwriting guidelines produced pursuant to the Special Call are open records under the Act.

We will discuss these questions *seriatim*.

A. Subpoenaed guidelines

Section 3(a)(1) of the act excepts from release "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." V.T.C.S. art. 6252-17a, § 3(a)(1). Article 1.19-1 of the Insurance Code, which establishes the subpoena powers of the department contains a confidentiality provision, section 1(d):

Any information or material acquired under this article under a subpoena is not a public record for as long as the board or commissioner considers reasonably necessary to complete the investigation, protect the person being investigated from unwarranted injury, or serve the public interest. The information or material is not subject to a subpoena, except a valid grand jury subpoena, until released for public inspection by at least one member of the board and the commissioner or, after notice and a hearing, a district court determines that the public interest and any investigation by the board member and the commissioner would not be jeopardized by obeying the subpoena.

A recent decision of this office, Open Records Decision No. 608 (1992), deals with another confidentiality statute within the Insurance Code, article 1.10D, section 5(a); that statute is, in relevant part, identical to article 1.19-1, section 1(d). In Open Records Decision No. 608, we advised, "The Legislature's intent to except [the

---

<sup>1</sup>The Office of Public Insurance Counsel, the requestor in this case, asserts that because it requested only guidelines issued pursuant to the special call, this question is moot. However, your amended response asserts that the guidelines of certain insurance companies, insofar as they were acquired under the subpoena powers defined by article 1.19-1 and are subject to a confidentiality agreement, are exempted. Since you have sought a ruling on this issue, and since the interpretation of the relevant confidentiality provision in article 1.19-1 may be of assistance in this matter, we will consider this question.

information in question] from public disclosure under the act is clear from the plain meaning of the statutory language. The decision of the commissioner as to whether such material should remain confidential controls here." Since article 1.19-1, section 1(d), like article 1.10D, section 5(a), gives the commissioner the authority to declare these materials confidential, the commissioner has the authority to enter into confidentiality agreements of the sort at issue here. Following the reasoning of Open Records Decision No. 608, we view the subpoenaed materials here as excepted under section 3(a)(1) of the act.

**B. Guidelines submitted pursuant to the special call.**

While the department maintains that those underwriting guidelines submitted under subpoena are exempt from required public disclosure under the act for the reasons detailed above, it does not endorse the insurers' suggestion that those guidelines, or the guidelines submitted pursuant to the special call, are also exempt under sections 3(a)(4) and 3(a)(10) of the act. A number of insurers have submitted briefs on this issue; their arguments are opposed in briefs from the department, the Office of Public Insurance Counsel, and the Consumers Union.

Section 3(a)(4) of the act protects "information which, if released, would give advantage to competitors or bidders." The purpose of this exception is to protect a governmental body's purchasing interest by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders. Open Records Decision No. 592 (1991). It is designed to protect the interests of a governmental body, not that of a private party. *Id.* It requires a showing of some actual competitive harm in a particular competitive situation. *Id.* Section 3(a)(4) clearly does not apply here.

Section 3(a)(10) of the act exempts from public disclosure information that is a trade secret. The determination of whether particular information is a trade secret is a fact question. Open Records Decision No. 552 (1990). This office, following the rule of *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958), relies upon the definition of trade secrets contained in the Restatement of Torts, section 757. According to the Restatement, a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

**RESTATEMENT OF TORTS § 757 cmt. b (1939).** The Restatement provides six factors to be considered in determining whether particular information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the] business;
- (2) the extent to which it is known by employees and others involved in [the] business;
- (3) the extent of measures taken to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended . . . in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.*

The department and the insurance companies dispute the facts concerning whether insurers have sufficiently protected the secrecy of their underwriting guidelines. The Office of Public Insurance Counsel, along with the department, asserts that the guidelines have not been kept confidential.

In the view of the department,

insurers do not adequately protect the confidentiality of such documents, which is required for protection as a trade secret. The underwriting guidelines are widely available to agents of the insurers, including independent agents, where applicable, and are known to the insurers' competitors. Such lack of protection of confidentiality is fatal to the insurers' argument that these documents are trade secrets.

Letter from Georgia D. Flint, Commissioner of Insurance, Texas Department of Insurance, to The Honorable Dan Morales, Office of Texas Attorney General (June 5, 1992) at 5-6. This view is shared by the Office of Public Insurance Council. See Letter from Lanetta Cooper, Staff Attorney, Office of Public Insurance Counsel, to The Honorable Dan Morales, Office of Texas Attorney General (June 22, 1992) at 4-5.

The insurers dispute this assertion. According to State Farm Insurance,

[s]ince insurance agents are among the principal representatives of the company who use and apply the underwriting guidelines, agents of course have access to them. Contrary to the Department's assertions, however, use of State Farm underwriting guidelines by State Farm agents does not provide competitors with access to them.

Letter from Susan G. Conway, Attorney, Vinson & Elkins, to The Honorable Dan Morales, Office of Texas Attorney General (June 19, 1992) at 5. Similarly, Mid-Century Insurance Company, Texas Farmers Insurance Company, and Texas Farmers County Mutual Insurance, in their letter brief of June 19, 1992, have denied the department's allegation, as do the Farm Bureau companies in their letter brief of August 26, 1992.

The department's allegation that insurers do not properly keep guidelines confidential, if true, would negate any trade secret claim. However, that allegation is not specific. This office cannot resolve disputes of fact in the opinion process. See Open Records Decision No. 552 at 4. Where fact issues are not resolvable as a matter of law or ascertainable from the face of the documents submitted for our inspection, this office must rely on the representations of the governmental body requesting our opinion on whether information constitutes a trade secret. *Id*; see Open Records Decision No. 426 (1985).<sup>2</sup>

In this case, the department has not sufficiently particularized its representations for us to resolve the factual disputes. We therefore recommend that the department resolve the particular issues concerning the various insurers' keeping of this information confidential, by whatever process it deems appropriate. Should the department find as a fact that a particular insurer is not keeping information confidential, such information is not a trade secret and must be released.<sup>3</sup>

---

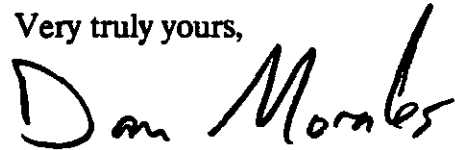
<sup>2</sup>Our analysis under Open Records Decision No. 552 ordinarily involves a question as to whether the proponent of trade secret protection has made a *prima facie* case for such protection. However, in this case, there is a factual dispute between the governmental entity and the proponent of trade secret protection as to certain of the elements of a *prima facie* case. Thus, we cannot resolve the issue under our ordinary trade secret analysis.

<sup>3</sup>Such a determination is, of course, subject to review in the district court.

**S U M M A R Y**

Insurance underwriting guidelines acquired by the Department of Insurance pursuant to its subpoena power under article 1.19-1 of the Insurance Code are exempt from disclosure under section 3(a)(1) of the Texas Open Records Act. The question of whether underwriting guidelines acquired by the department pursuant to a special call are trade secrets exempted from disclosure under section 3(a)(1) of the act depends upon a factual determination as to whether particular insurers have kept the guidelines confidential. Such a factual decision is outside the purview of the opinion process. Should the department determine as a matter of fact that a particular insurer is not guarding the confidentiality of certain information, that information is not a trade secret as a matter of law.

Very truly yours,

A handwritten signature in black ink that reads "Dan Morales". The signature is fluid and cursive, with the first name "Dan" and last name "Morales" clearly distinguishable.

DAN MORALES  
Attorney General of Texas

WILL PRYOR  
First Assistant Attorney General

MARY KELLER  
Deputy Assistant Attorney General

RENEA HICKS  
Special Assistant Attorney General

MADELEINE B. JOHNSON  
Chair, Opinion Committee

Prepared by James Tourtelott  
Assistant Attorney General